United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig - Contains affidavit of mailing

77-1055

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1055

UNITED STATES OF AMERICA,

Appellee,

—*against*—

JAMES DI GIOVANNI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1055

UNITED STATES OF AMERICA,

Appellee,

—against—

JAMES DI GIOVANNI,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

James Di Giovanni appeals from an order of the United States District Court for the Eastern District of New York (Edward R. Neaher, *J.*) entered on December 8, 1976, which order denied appellant's motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce his concurrent sentences of five years imprisonment. Appellant received these sentences on July 23, 1976, after he pleaded guilty, on May 21, 1976, to three counts of a six count indictment charging him with conspiring to possess and distribute cocaine, in violation of Title 21, United States Code, Section 846, and with possessing and distributing cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Statement of Facts

I.

Appellant was arrested on Staten Island on the evening of March 29, 1975, as he was preparing to sell a pound of cocaine to undercover agents of the New York Drug Enforcement Task Force (GA. 1).[1] After being taken into custody, appellant gave a statement to the agents. In this statement, he explained how he had obtained the cocaine, and he described the individuals from whom he had received the narcotics. Shortly thereafter, while the agents listened, appellant spoke on the telephone with his suppliers and arranged a meeting for the delivery of more cocaine. Later that evening, acting on the information obtained from appellant and the monitored telephone conversation, the agents apprehended two brothers named Stephen and Stanley Lifschitz. Following their arrest, after which complaints were filed against them, the Lifschitz brothers were identified by appellant as the individuals from whom he had received the pound of cocaine with which he had been arrested (GA. 1).[2]

---

[1] References preceded by the letters "GA" are to pages of the Government's appendix. References preceded by the letter "A" are to pages of appellant's appendix.

[2] Appellant was indicted on May 22, 1975, and charged in six counts with violations of the federal narcotics laws. Count One alleged that during the period between January 14 and March 29, 1975, he conspired with his brother Stephen Di Giovanni and one Willie Nelson to possess and distribute cocaine, Title 21, United States Code, Section 846. Counts Two and Three charged appellant with possession and distribution, respectively, of one eighth of a kilogram of cocaine on January 17, 1975, Title 21, United States Code, Section 841(a)(1), Title 18, United States Code, Section 2. Counts Three and Four charged appellant with the possession and distribution of small samples of cocaine on March 24, 1975, Title 21, United States Code, Section 841(a)(1),

[Footnote continued on following page]

II.

During the period between appellant's arrest on March 29, 1975, and his sentencing on July 23, 1976, the Government made repeated efforts to enlist appellant's cooperation in the investigation in the case. Specifically, it was requested that appellant testify in the grand jury and at trial concerning his receipt of the cocaine from Stephen and Stanley Lifschitz (GA. 2). Despite the efforts of the Government, however, appellant steadfastly refused to give any testimony, either in the grand jury or at a trial (GA. 2). Thus, without appellant's testimony, the Government dismissed the complaint against the Lifschitz brothers and abandoned the prosecution of the Lifschitz's (GA. 2).

On July 9, 1976, the United States Attorney's Office sent a letter to Judge Neaher, with a copy to appellant's counsel, setting forth the facts of appellant's initial assistance to the agents and his subsequent refusal to cooperate (GA. 1).

Appellant appeared for sentencing on July 23, 1976. First, his attorney argued for leniency on behalf of his client, and then appellant and his father each briefly addressed the court (GA. 5-14). In addition, the court noted that it had received letters from family and friends and from appellant himself in connection with the case, which letters were not shown to the prosecutor (GA. 11). Judge Neaher then turned to the Government's letter of July 9th, pointing out that appellant's refusal to testify was not indicative of rehabilitation and was enabling two

---

Title 18, United States Code, Section 2, and Count Six alleged that on March 29, 1975, appellant possessed one pound of cocaine with the intent to distribute it, Title 21, United States Code, Section 841(a)(1), Title 18, United States Code, Section 2 (A. 5-8). On May 21, 1976, appellant entered pleas of guilty to Counts One, Three and Six of the indictment (A. 3).

major narcotics suppliers to go free (GA. 14-16). When appellant's attorney contended that appellant had refused to cooperate because he wished to sever his ties with the drug world, the Assistant United States Attorney responded that the Government did not desire appellant, as part of his cooperation, to become involved again with his former narcotics associates and that, in fact, such contacts were discouraged (GA. 17). The prosecutor emphasized that the cooperation which was being sought, and which had been refused, was grand jury and trial testimony (GA. 17). Thereafter, following some further colloquy, Judge Neaher sentenced appellant on each count to five years imprisonment, with parole eligibility after one year, and a three year special parole term, the sentences on all three counts to run concurrently (GA. 19, 21). After passing sentence, the court indicated that it would favorably entertain a timely Rule 35 motion if appellant changed his mind and decided to cooperate (GA. 19-20). After sentencing, Counts Two, Four and Five were dismissed on motion of the Government (GA. 21).[3]

III.

On November 19, 1976, although he had still made no effort to cooperate, appellant moved under Rule 35 of the Federal Rules of Criminal Procedure to have his

---

[3] Appellant's brother Stephen pleaded guilty to Count Three of the indictment (distribution of one eighth of a kilogram of cocaine on January 17, 1975) and was sentenced to two years imprisonment, all but six months suspended, five years probation and a three year special parole term (A. 3). This sentence was later reduced, and Stephen Di Giovanni has been released from custody. The remaining charges against Stephen were dismissed (A. 3).

The charges in the indictment against Willie Nelson were dismissed after he pleaded guilty to a related narcotics conspiracy charge and received a probationary sentence (A. 3).

sentence reduced. In support of the motion, appellant submitted a letter to Judge Neaher, in which, among other things, he sought to explain to the court his refusal to testify for the Government in the Lifschitz case. Appellant asserted, as he had in a letter he wrote to Judge Neaher prior to sentencing, that at the time of his arrest he was told by the agents that he would not have to testify in the grand jury or at trial.[4] He also stated that he had been threatened by the Lifschitz brothers, that he was emotionally unable to testify against anyone in court and that he had not been told that his refusal to cooperate would be held against him. Finally, appellant indicated again, as he had at sentencing, that his refusal to testify was also motivated by the desire not to become involved once more with narcotics (GA. 22-24).[5]

Although the Government took no position on the merits of the Rule 35 motion, the United States Attorney's Office did submit a letter, dated November 30, 1976, emphasizing that appellant had never been asked or encouraged to associate with drug dealers and pointing out that prior to the time of the guilty plea appellant's attorney had been told that at sentencing a letter would be submitted concerning the refusal to cooperate (A. 11-12).

On December 8, 1976, Judge Neaher denied the Rule 35 motion, and this appeal followed (A. 13-14).

---

[4] At sentencing, neither appellant nor his attorney mentioned any such promises, even when the court focused attention on the refusal to cooperate. And it was not until after the Rule 35 motion was denied that the Government saw appellant's pre-sentence letter to the judge.

[5] Appellant has never claimed that his refusal to testify was based on Fifth Amendment grounds. *Compare, United States* v. *Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

ARGUMENT

The district court acted well within its discretion in denying appellant's Rule 35 motion.

Appellant argues on appeal that he should be resentenced. He contends that when the court sentenced him and later denied his Rule 35 motion, it was misinformed as to certain facts of his case. Specifically, it is claimed that Judge Neaher was unaware that appellant had allegedly been promised by the agents that he would not have to testify in the Lifschitz case. Thus, so the argument goes, it was wrong for the judge to consider appellant's refusal to cooperate when imposing sentence.

Preliminarily, it should be noted that, by appellant's own admission, the *sole* basis for this appeal is the claim that the agents promised appellant that he would not have to testify in the grand jury or at trial, a claim which, incredibly, appellant did not raise in open court at sentencing when he had the opportunity to do so. In order to respond to this allegation we would have to go outside the record in the case. This we decline to do. However, it is unnecessary to even reach this factual issue, for it is clear that Judge Neaher properly exercised his discretion when he imposed sentence and denied the Rule 35 motion, whether or not any promise was made by the agents.

This Court has recently reaffirmed the well-settled principle that sentencing is a matter totally within the discretion of the trial judge and that, generally, a sentence which is within statutory limits is not subject to appellate review. *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976); *United States* v. *Robin*, 545 F.2d 775, 779 (2d Cir. 1976), *rehearing denied*, — F.2d —, Slip Op. 2591 (2d Cir. March 30, 1977); *United States* v. *Stein*, 544 F.2d 96, 101 (2d Cir. 1976). In this regard, we need only note that here, for very serious crimes —narcotics conspiracy and the possession and distribu-

tion of well over a pound of cocaine—appellant received a sentence of five years imprisonment, with eligibility for parole after one year, and the minimum three year special parole term; when he could have been sentenced to 15 years imprisonment, given a lengthy special parole term and fined $25,000. Title 21, United States Code, Sections 812 and 841(b)(1)(A).

Nevertheless, where it can be shown that there is a possibility that sentence was imposed on the basis of false information or false assumptions concerning the defendant, an appeal will lie, and the sentence will be vacated. *United States* v. *Robin*, *supra*, 545 F.2d at 779; *United States* v. *Stein*, *supra*, 544 F.2d at 101. And, indeed, it is upon this general principle which appellant relies when he argues that he should be resentenced because the court was allegedly misinformed concerning the facts of his cooperation. We believe that the contention is totally without merit.

In the first place, there is no support in the record for appellant's claim that Judge Neaher was "obviously unaware" of the facts concerning appellant's cooperation. Indeed, the details of appellant's initial assistance to the agents were fully set out in the July 9th letter from the United States Attorney's Office (GA. 1). Moreover, assuming *arguendo* that the agents *did* tell appellant that he would not have to testify, that fact too was before the court, for the point was raised in both appellant's presentence letter to the judge and also his letter submitted in connection with his Rule 35 motion (GA. 22). Thus, it is clear that at all times what was before the court here, with respect to the alleged promise of the agents, was appellant's unchallenged version of the facts, whether or not that version was in fact correct.[6] Accordingly, we

---

[6] This case thus differs from *United States* v. *Almestica*, 546 F.2d 524 (2d Cir. 1976), where there *was before the court* at the time of sentencing a sharp factual dispute concerning the defendant's understanding of what the government expected of him in terms of cooperation.

fail to see how appellant can argue that the judge was misinformed about the facts concerning his cooperation, since all the court had before it was appellant's side of the story.[7]

Furthermore, it is equally clear that in all respects appellant's sentencing was proper. Appellant's lawyer spoke at length in his behalf, and both appellant and his father were given the opportunity to address the court. In addition, Judge Neaher, "(f)ollowing the highly desirable course of making explicit a factor he deemed material for the sentence," *United States* v. *Hendrix*, 505 F.2d 1233, 1234 (2d Cir.), *cert. denied*, 423 U.S. 897 (1975), stated that in considering the extent to which appellant had been rehabilitated the court was taking into account the fact that appellant had at first assisted the agents and then refused to testify in the grand jury and at trial (GA. 19).

Judge Neaher did nothing more here than he was permitted to do, for it is well-recognized that cooperation with the prosecution, or the lack thereof, is a factor which a court may properly consider when passing sentence. *United States* v. *Malcolm*, 432 F.2d 809, 817 (2d Cir. 1970); *United States* v. *Vermeulen*, 436 F.2d 72 (2d Cir.), *cert. denied*, 402 U.S. 911 (1971); *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972). If no promise was made by the agents, there is plainly no grounds for an appeal. Assuming *arguendo*, however, that the agents did promise appellant that he would not have to testify, the fact remains that thereafter the Government repeat-

---

[7] As noted above, appellant's pre-sentence letter referring to the alleged promise of the agents was not seen by the prosecutor prior to sentencing, and the point was not raised during the sentencing proceedings. Similarly, the Government's letter to the court in connection with the Rule 35 motion makes no mention of the point.

edly sought appellant's assistance but at all times appellant steadfastly refused to cooperate. Either way, the court was entitled to consider appellant's refusal to assist the Government in the Lifschitz case. Therefore, appellant's contentions are frivolous.

CONCLUSION

The order of the district court denying the Rule 35 motion should be affirmed.

Dated: Brooklyn, New York
April 11, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1977— 714—018—072

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

BARBARA ALLEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 11th day of April 19 77 she served a copy of the within 2 copies of the Brief for the Appellee and 2 copies of the Appendix for the Appellee by placing the same in a properly postpaid franked envelope addressed to:

Irving Cohen, Esq.

299 Broadway

New York, New York 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen
BARBARA ALLEN

Sworn to before me this

11th day of April 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 1979